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IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1976

NO. 76-346

FRED LEE JONES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE SUPREME COURT OF THE UNITED STATES

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FRED LEE JONES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 1, 1976, Petition for Rehearing denied on July 12, 1976, extension of time for petitioning for Writ of Certiorari granted by this Court on August 13, 1976.

OPINION BELOW

The opinion of the United States Fifth Circuit Court of Appeals in United States v. King, ____ F. 2d, 3801 (5th Cir. 1976) affirmed petitioner's conviction for conspiracy to sell firearms in violation of Chapter 44 of Title 18 of the United States Code, Section 371, and for sale of firearms in violation of Chapter 18 of the United States Code Section 922 (a) (1) and 924 (a). Said opinion is contained in the appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 1, 1976, and a Petition for Rehearing was denied on July 12, 1976. This Honorable Court granted petitioner an extension of the time allotted for petitioning for Certiorari on August 13, 1976. Jurisdiction of this Honorable Court is invoked

under 28 USC Section 1254 (1).

QUESTIONS PRESENTED

1. Did the trial court, by allowing illegally seized firearms to be brought into the court and identified by government agents throughout the course of the trial violate petitioner's right to due process and freedom from unreasonable search and seizure?

2. Did the trial judge, by commenting on the evidence presented during petitioner's trial, deny petitioner the presumption of his innocence and right to due process?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Fifth Amendment, United States Constitution:

"No person shall. . . be deprived of life, liberty or property, without due process of law. . . ."

3. The statutes under which the petitioner was prosecuted, 18 U.S.C. 922 (a)(1) and 18 U.S.C. 923 (a), provide as follows:

"Section 922. Unlawful Acts

(a) It shall be unlawful -

(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer,

to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm, ammunition in interstate or foreign commerce;"

"Section 923. Licensing

(a) No person shall engage in business as a firearms or ammunition importer, manufacturer, or dealer until he has filed an application with, and received a license to do so from, the Secretary. ..."

4. Additionally your petitioner was tried and convicted under the conspiracy statute of violating the above-described statute. The conspiracy statute being 18 U.S.C. 371 which provides as follows in part:

"Section 371. Conspiracy to commit offense or defraud United States

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, one or more such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 nor imprisoned for more than five years, or both."

STATEMENT OF THE CASE

The Appellant, Fred Lee Jones, along with Willie D. King and Tellis Jones, Co-appellants, was tried by a Federal Traverse Jury in the United States District Court for the Middle District of Georgia, Thomasville Division, on a joint, two-count indictment, alleging that the three Appellants had engaged in the business of

dealing in firearms without a license in violation of Chapter 44 of Title 18 of the United States Code, Section 371; and that they had conspired together to engage in the said felony in violation of Title 18 of the United States Code, Section 922(a)(1) and 923(a). The trial occurred on May 21 and May 22, 1975.

Appellant was found guilty on both counts to said indictment, and he was sentenced by the trial judge on May 28, 1975, to serve two, three-year consecutive sentences in federal custody. Appellant, Fred Lee Jones, within the time allowed by law, filed his notice of appeal from his conviction and sentence to the Clerk of the United States District Court for the Middle District of Georgia, Thomasville Division.

In brief, the Government's evidence showed that numerous firearms had been

purchased by Appellants between November 1, 1969, and March 22, 1974, at three retail stores in Donalsonville, Georgia. Some of the firearms which were purchased by Appellants allegedly were sold by them to a Government agent and to a paid Government informer. There also were Government witnesses who testified that some of the firearms purchased by Appellants were recovered in the States of New York and New Jersey. Another Government witness, who also was a paid informer, testified that Appellant Fred Lee Jones agreed to sell firearms to him on the day of Appellant's arrest.

The Appellants' evidence showed that they all denied that any of them had ever engaged in the business of dealing in firearms and that they had not conspired with each other to further such activity.

ARGUMENT

1. By allowing numerous firearms to be brought into the Court and identified by law enforcement agents throughout the course of Appellant's trial, the trial judge violated Appellant's constitutional rights to due process and freedom from unreasonable search and seizure.

Appellant argued in his Appeal to the Fifth Circuit Court of Appeals that the trial judge had committed reversible error in allowing illegally seized evidence to be brought into the courtroom, identified by Government witnesses, and paraded before the Jury. In ruling on this contention the Fifth Circuit indicated that the question". . . is now moot, because, during Appellant's trial, the trial judge excluded the evidence sought to be suppressed upon Appellant's objection on other grounds." United States v. King, ____F. 2d, 3801 -

3807 (5th Cir. 1976). In effect, the Court of Appeals indicated that if the evidence is theoretically withheld from the Jury by disallowing the admission into the record this will bar the defendant in a criminal case from objecting when he is in fact prejudiced by the physical presence of the evidence in the courtroom and its display to the Jury. Such a totally unrealistic approach to the administration of the law cannot be allowed to remain in use if the exclusionary rule is to remain viable.

This Court has held that the exclusionary rule is an inherent part of due process as that term is defined by the Fifth Amendment, U. S. v. Weeks, 232 U.S. 383 (1914), the Fourteenth Amendment, and Mapp v. Ohio, 367 U. S. 643 (1961). This rule is crucial for two purposes: First, it deters police illegality by removing

any benefit to be derived from such acts. Second, it indicates a refusal on the part of the courts to participate in such illegality by accepting illegally seized evidence, much as this Court refused to participate in illegal and invidious discrimination by giving its seal of approval to racially restrictive covenants in its landmark decision in Shelly v. Kramer, 334 U. S. 1 (1948).

If the exclusionary rule, which had its genesis in the federal system, is to remain a viable means of assuring due process and preventing unreasonable search and seizures, it is elementary that illegally seized evidence must in fact be excluded from the courts. There is no deterrent to prevent the police from using illegal methods if the evidence can still be presented to the jury in a trial, albeit indirectly and informally. When

the evidence is so used, the courts have not only participated in the illegality they sought to prevent, but have compounded it by giving lip service to the exclusionary principal and hypocritically avoiding its intended effect. If federal judges are allowed to "let the evidence in the back door" by permitting it to be brought into the courtroom, displayed before the jury, and identified by witnesses before the jury, the evidence has not, in fact, been excluded; and the benefits of the exclusionary rule, which this court has determined to be a prerequisite for providing due process of law, have been denied the defendant.

2. The trial judge's comments on the evidence at Appellant's trial denied Appellant his constitutional rights to due process and presumption of innocence.

Recent decisions by this Court

have emphasized the presumption of innocence afforded the defendant in a criminal action by refusing to allow the prosecution in a criminal case to shift the burden of proving material elements of the crime to the defendant. See In Re Winship, 397 U. S. 358 (1970), Mullaney v. Wilbur, 421 U. S. 684 (1975). Fundamental due process and the presumption of the defendant's innocence demands that the prosecution prove the defendant's guilt beyond a reasonable doubt by evidence presented to the jury, and that convictions not be the result of improper burdens of proof or persuasion placed on the defendant.

When the trial judge in the instant case told the jury "the defendants were all obviously involved in some way," he denied the defendant the presumption of his innocence and his right

to procedural due process by making it appear that he sided with the Government and by saddling the defendant with the burden of disproving such remarks and proving his own innocence.

The remarks of the judge could have been cured by an immediate caution to the jury, as required by the rule promulgated to date in the Fifth Circuit. See United States v. Musgrave, 444 F. 2d 755, 761 - 763 (5th Cir. 1971). Instead of taking such corrective measures the judge complicated the impact of his comments to the jury by hearing and denying a motion for mistrial by co-counsel in the presence of the jury.

This Court has ruled in the past that for a judge to comment on the evidence it must be an exceptional case, such as one where all elements of the crime are admitted without dispute.

U. S. v. Murdock, 290 U. S. 389 (1933). Moreover, when such comments are made, this Court has indicated the trial judge should make it clear to the jury that all matters of fact are for their determination. Quereia v. United States, 289 U.S. 466 (1933). By commenting on the evidence involved and failing to give such a caution to the jury, the trial judge clearly denied Appellant his constitutional rights to due process and presumption of innocence.

CONCLUSION

For the above and foregoing reasons, petitioner respectfully requests that his petition for Certiorari be granted.

Respectfully submitted,

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UNITED STATES of America, Plaintiff-Appellee,

v.

Willie D. KING, Fred Lee Jones and Tellis Jones, Defendants-Appellants.

No. 75–2840.

United States Court of Appeals, Fifth Circuit.

June 1, 1976.

By judgments of the United States District Court for the Middle District of Georgia, at Thomasville, J. Robert Elliott, Chief Judge, the defendants were convicted of conspiracy to engage in business of dealing in firearms without being licensed to do so and of having engaged in that business without a license and they appealed. The Court of Appeals, Kraft, Senior District Judge of the Eastern District of Pennsylvania, Sitting by Designation, held, inter alia, that evidence sustained convictions, that trial court did not err in denying motion for mistrial on ground that he had commented on evidence from bench, that trial court properly exercised discretion in ruling that proffered witness was not qualified to testify as a handwriting expert and the statutes under which defendants were convicted are constitutional.

Affirmed.

1. Criminal Law ⇨1159.2(5)

If, taking evidence most favorable to Government, there is substantial evidence to support verdicts, they must be sustained by reviewing court.

2. Conspiracy ⇨47(3)
Weapons ⇨17(4)

Review of record disclosed sufficient evidence from which jury could find that all three defendants were guilty of conspiracy to engage in business of dealing in firearms without being licensed to do so and with having engaged in that business without a license. 18 U.S.C.A. §§ 371, 922(a)(2).

3. Criminal Law ⇨656(1)

There was no error in denying motion for mistrial on ground that trial judge had commented on the evidence from the bench where trial judge was merely trying to render comprehensible by accurate reference to prior testimony of witness and by suggestion that counsel frame more specific questions and trial judge clearly and expressly charged jury that they were the sole judges of witnesses' credibility, that in making any reference to any evidence trial judge was expressing no opinion and that facts were solely for jury's determination.

4. Criminal Law ⇨481

Whether proffered witness was sufficiently qualified to enable him to testify as an expert on handwriting and to express his opinion was for trial judge in exercise of his discretion.

5. Criminal Law ⇨481

Trial judge did not abuse discretion in ruling that a prospective witness, who was employed full time in a job unrelated to handwriting and who had taken a correspondence school course in handwriting analysis and had done such analysis as self-study, was not qualified as a handwriting expert.

6. Weapons ⇨1

Defendant who was convicted of engaging, without license, in business of

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dealing in firearms and of conspiring with others to do so could not successfully contend that the statutes violated his right to keep and bear arms. 18 U.S.C.A. §§ 922(a)(1), 924(a); U.S.C.A.Const. Amends. 2, 5.

7. Criminal Law ⇐13.1(2)

Under statute proscribing engaging in business of dealing in firearms without a license term "business" is commonly understood to mean an activity engaging some of one's time, attention and effort performed in expectation of profit or other benefit, while term "dealing in firearms" is commonly understood as selling and/or trading in firearms as well as acquiring firearms for sale by purchase and/or trade, and the terms are not unconstitutionally vague. 18 U.S.C.A. § 922(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

8. Weapons ⇐2

Congress was within its power in enacting statute proscribing the dealing in firearms without a license and providing penalties therefor even in absence of an interstate nexus. 18 U.S.C.A. §§ 922(a)(1), 924(a).

9. Criminal Law ⇐711

Trial judge who suggested that he was thinking about allowing 30 minutes for the counsel of each of the defendants for final argument but who made no order of limitation and did not terminate closing argument of appealing defendant's counsel, who did not request additional time, did not unreasonably limit length of appealing defendant's closing argument to jury.

Appeals from the United States District Court for the Middle District of Georgia.

Before DYER and CLARK, Circuit Judges, and KRAFT *, District Judge.

KRAFT, District Judge:

Appellants, Willie D. King, (King) Fred Lee Jones and his brother, Tellis Jones, were charged with (1) conspiracy to engage in the business of dealing in firearms without being licensed to do so,[1] and (2) having engaged in that business without a license.[2] The Jones brothers were convicted of the substantive charge and all three appellants were convicted of conspiracy.

Two issues are raised by all appellants, one issue by two appellants and the remaining issues are separately raised only by Tellis Jones. We shall deal first with the issues commonly raised.

[1] The first contention made by all three appellants is that the evidence was insufficient to support the verdicts. We disagree. If, taking the view most favorable to the Government, there was substantial evidence to support the verdicts, they must be sustained. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

From our full review of the evidence it is apparent that the jury was warranted in finding the following facts: Fred Lee Jones, a police sergeant in Donaldsonville, Georgia, and his brother, Tellis Jones, were cousins of King. Tellis Jones and King were usually employed outside Donaldsonville, either on the premises of Action Movement Fund or the nearby premises of Action Movement, Inc. The Fund had been founded

* Senior District Judge of the Eastern District of Pennsylvania, sitting by designation.

1. 18 U.S.C. § 371

2. 18 U.S.C. § 922(a) and (2)

by Dr. Dallas Moore, an uncle of the Jones brothers and a purported spiritual healer, who conducted his services as, or under the auspices of, Action Movement, Inc. Dr. Moore's services attracted substantial numbers of people, many of whom came by bus from other states, including New Jersey and New York. For food and shelter the visitors frequently used facilities available through Action Movement Fund. The existence of a bus station, a parking lot and the frequent presence of large numbers of strangers in this rural setting provided a ready entree for the undercover agents of the Alcohol, Tobacco and Firearms Bureau (AT&F) in their investigation of the suspected unlawful activities of the appellants.

Between March 17, 1969 and November 29, 1974 Tellis Jones purchased more than ninety firearms. From February 25, 1971 to November 22, 1974 Fred Lee Jones purchased more than sixty firearms. Between November 1, 1969 and March 22, 1974 King bought at least eight firearms. Most of these purchases, mostly handguns of various calibers, were made from Hatcher's, a sporting goods store in Donaldsonville.

One of the handguns purchased by Tellis Jones on May 28, 1969 was seized by police in Newark, New Jersey in August, 1970. Another, purchased by Tellis Jones on July 18, 1972, was seized by police in the same city later that year. Two handguns purchased by Fred Lee Jones on successive days in October, 1973 were seized by police in Rochester, New York in December of the same year.

On February 11, 1974 Tellis Jones assured Joseph Forbes (Forbes), an undercover agent of AT&F, in response to the latter's inquiry, that guns were easy to procure and that he could get them for Forbes in Donaldsonville. Forbes then arranged to buy two .25 cal. automatic pistols, paid Jones his quoted price of $80 and agreed to meet Jones, as the latter requested, in the early afternoon. When they met, as arranged, Jones gave him two .25 cal. automatic pistols and requested an additional $20, which Forbes paid. In parting, Forbes expressed his intention to return in about a month to pick up more guns. Jones quoted him a price of $140 on a .44 cal. magnum and told Forbes to write him or call him at a telephone number he then gave Forbes.

Forbes returned on March 21, 1974 and met Tellis Jones about 6:00 P.M., telling him he wanted to get more guns. Jones said it was too late; that everything was closed. He instructed Forbes to meet him the next morning. They met again the following morning at a parking lot near Dr. Moore's house. Jones asked Forbes what type guns he wanted and was told a .357 cal. magnum, a .22 cal. and a .32 cal. Jones made some calculations and said the price would be about $212. Forbes gave him $215 and was told to await Jones' return. Jones reappeared about an hour later, told Forbes to wait a moment, went to his truck and came back with a box containing a .357 cal. magnum revolver, which he delivered to Forbes. Jones said he was only able to pick up one gun at the gun shop, because an F.B.I. agent was then in the shop; that he would return to the shop about 1:00 P.M. and get the other two guns. After a moment or so, Jones walked to another truck, a Ford bearing a fish decal, in which his brother, Fred Lee Jones, was sitting. He returned to Forbes shortly, carrying a small box, which he gave to Forbes. Therein was a .32 cal. revolver. Jones told Forbes that his brother (Fred Lee Jones) would pick up the .22 cal. for Forbes later and that Forbes should remain at the park-

ing lot. Forbes stayed there until about 4:00 P.M. and, not having been contacted by either of the Jones brothers, asked another man (King) in the immediate vicinity if he had seen Tellis Jones. King told Forbes that Tellis had gone, but that Tellis' brother was looking for Forbes and had a pistol for him. Forbes said he didn't know Tellis' brother. King said Tellis' brother was probably at the police station. Forbes indicated his disinclination to go there and King said he would go with him. Forbes and King went to the police station in Forbes' truck. There Forbes saw Fred Lee Jones, in uniform, sitting in a police car. King alighted from Forbes' truck and walked toward the police car. Fred Lee Jones got out of the police vehicle to meet King and the two conversed for a time. King then walked over to Fred Lee Jones' truck nearby, the Ford with a fish decal, and removed a brown paper bag therefrom. He walked back to Forbes' truck and gave Forbes the bag in which was a .22 cal. revolver. The business records of the sale at Hatcher's indicate that this firearm was sold to Willie D. King on the same day. The evidence was sufficient to support a finding that King was the purchaser, though there was conflicting evidence on the authenticity of his purported signature on the document.

In late March, 1974, Elisha Shepard (Shepard), another undercover employee of AT&F, went to the police station in Donaldsonville, seeking Fred Lee Jones. There he met Jones, who wore the uniform and insignia of a police sergeant. Jones accompanied Shepard outside. Shepard told Jones that a fellow from Newark, New Jersey had told him Jones had guns for sale. Jones said "yes". Shepard told Jones he was just out of prison and "didn't want to do no paper work." Jones assured him that he should not worry; that Jones could take care of it. Jones then asked Shepard how many guns he wanted. Shepard indicated two, but stated that he wanted to see them, so he could see just what he wanted. Jones instructed Shepard to follow him. Shepard followed Jones, who was in his police car, to Jones' home. On arrival Jones told Shepard to wait, then entered the rear of his home, unlocked the front door and invited Shepard in. He showed Shepard two .22 cal. revolvers which Jones said Shepard could have for about $34.95 a piece. He also showed Shepard a .32 cal. pistol, which Shepard declined because of the price Jones quoted. Shepard inquired about a good .38 cal. revolver and Jones said he would sell him his .38 Smith & Wesson, the service gun Jones was then wearing, for $75. Shepard said he did not want to pay that much, but bought the two .22 caliber firearms from Jones for $34.95 each. Shepard then told Jones he might want more guns later and inquired how he could contact Jones. Jones told him to contact Jones at the police station and also wrote on a piece of paper a telephone number at which Shepard could call him.

Shepard called the number Jones had given him on January 28, 1975 and talked with Jones, telling him he wanted to order some guns, two 12 ga. automatic or pump shotguns, a .357 cal. magnum revolver and ten .22 cal. Saturday night specials. Jones said he had to have the money first to enable him to buy the ten Saturday night specials, but said he thought he already had the rest of the firearms on hand. Jones told Shepard to call back later to make sure that Jones was able to get the firearms requested. Shepard called Jones back on the following Friday and was told by Jones that he

had all the firearms. Shepard told Jones he was unable to come himself and would send his nephew, Willie, to pick up the guns.

On January 31, 1975, Willie Wright, (Wright) another undercover agent of AT&F, went to Donaldsonville, made a telephone call to the police station and then went there, looking for Fred Lee Jones. He found Jones outside the police station talking to someone. Fred Lee Jones came over to Wright's car and told Wright he was expecting him. Wright asked "could I cop some weapons, firearms." Jones asked whether Wright was "Willie". Wright said he was. After some further irrelevant conversation, Jones said he had some weapons for sale and instructed Wright to follow him, first to the bus station, then to Jones' house. Upon arrival at Jones' house, Jones opened the trunk of his car and showed Wright weapons that Jones said were for sale, to wit, seven rifles and three handguns. Jones quoted the price for the firearms and Wright pretended he could not remember them all, whereupon Jones wrote them down, together with the prices for other firearms that Jones said he could get for Wright, if the latter wanted to buy them. Wright said he would have to go and get some money. Wright left and shortly thereafter Fred Lee Jones was arrested.

[2] There was ample evidence that Tellis Jones and Fred Lee Jones had, in concert, been engaged in the business of dealing in firearms for several years and that neither had ever been licensed. The existence of a conspiracy so to engage in that business was a reasonable inference to be drawn from the concert of action. While the evidence against King was substantially less in volume, there was sufficient evidence to enable the jury to find beyond a reasonable doubt that King knew the conspiracy existed and the nature of that conspiracy and that his participation and his acts were intended to further the objects of the conspiracy. *See United States v. Morado* (5 Cir. 1972), 454 F.2d 167, 175; *Causey v. United States* (5 Cir. 1965), 352 F.2d 203.

[3] Though all appellants now assert that the denial of the motion for mistrial was error, it is noted that the motion was made only by counsel for Tellis Jones and that the only reason advanced to support the motion was that "Your Honor has commented on the evidence from the bench."

The episode stemmed from the confused and confusing interrogation[3] of

3. "Q Mr. Forbes said he purchased all of his guns from Tellis Jones, didn't he?

A The first time he was down here he got the two guns from Tellis. That is what he told me, yes.

Q Didn't he testify yesterday that he got the others from Tellis as well?

A He made contact with Tellis and he picked up some at the Police Department where he said that Willie King rode with him to the Police Department and they went and talked with Freddie and got some guns.

Q That is not what he testified to. Didn't he testify that the guns were purchased from Tellis?

A I don't understand what you are asking, what Forbes told me or what Forbes testified to?

Q I am asking you how many of these guns came to you from a special agent and said he bought them directly from Fred Lee Jones? Aren't these the only two, the two you are talking about a while ago that Mr. Shepard delivered to you?

Mr. Brazil, is that a hard question?

THE COURT: Well, I can understand why he is having a hard time answering the question because I remember the man's testimony. He said that one of the men went with him to the Police Department. Freddie Lee Jones came out, there was a discussion and then

Brazil, an agent of AT&F, by Tellis Jones' counsel, which the trial judge sought to render comprehensible by accurate reference to the prior testimony of the witness, Forbes, and by the suggestion that counsel frame more specific questions. It is clear that the trial judge meant only that the three defendants were mentioned in Forbes' testimony and nothing more. The charge clearly and explicitly instructed the jurors that they were the sole judges of the witnesses' credibility; that, in making reference to any evidence, the trial judge was expressing no opinion and that the facts were solely for the jury's determination. The trial judge properly and adequately fulfilled his role. See *United States v. Jacquillon* (5 Cir. 1972), 469 F.2d 380, 387.

Two of the appellants, King and Tellis Jones, next contend that the trial judge abused his discretion in ruling that a prospective expert witness, David Anderson, did not qualify as a "handwriting expert".

The record reveals that Anderson was employed full time by the Social Security Administration in a job unrelated to handwriting. He had taken a correspondence school course in "handwriting analysis", had done such analysis daily as self-study, had no laboratory and trained under no one. Rather than being an "examiner of questioned documents", in the commonly accepted sense, the proffered witness purported to possess expertise in discerning the character or type of a person from that person's writing, not the identity of the scrivener.

[4, 5] The preliminary determination whether Anderson qualified sufficiently to enable him to testify as an expert and, so, to express his opinion, was for the trial judge in the exercise of his sound discretion. *De Freese v. United States* (5 Cir. 1959), 270 F.2d 737. We conclude that the discretion of the trial judge was properly exercised. We also note, in passing, that the government's handwriting expert, who had examined the questioned documents and of whose exculpatory conclusions the appellants' counsel had been apprised by the government, was present, was made available to and was called by appellants as their witness.

We next review of the contention of the appellant, Fred Lee Jones, that the district court erroneously denied his motion to suppress.

This question, which initially involved the extent of the jurisdiction of the state court judge, who issued the search warrant, is now moot, because, during appellant's trial, the trial judge excluded the evidence sought to be suppressed upon appellant's objection on other grounds.

[6] Finally, we consider the several contentions made only by appellant, Tel-

somebody went to a truck and got the guns and brought them back. In other words, that is the reason he is having trouble answering the questions because all three of the Defendants were apparently involved in some way in that and I can understand—if you will just ask him a question specifically where he can answer it.

MR. SWEARINGEN: Your Honor, may we have the Jury out. I have a motion to make.

THE COURT: You can make it right now.

MR. SWEARINGEN: We would ask that you would declare a mistrial. We would respectfully submit that Your Honor has commented on the evidence from the bench.

THE COURT: I commented on the evidence to the effect that I want Counsel to ask the Witness a question specific in light of the evidence that has been heard so that he can answer it. That is—I commented on it to that extent."

lis Jones. The first of these assails 18 U.S.C. §§ 922(a)(1) and 924(a) as violative of appellant's rights under the Second and Fifth Amendments to the Constitution.

With the argument that the statute violates appellant's right to keep and bear arms we firmly disagree. He was neither charged with nor convicted of keeping and bearing arms. He was charged with and convicted of engaging, without a license, in the business of dealing in firearms and of conspiring with others so to do. See *United States v. Miller*, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939); *United States v. Day* (6 Cir. 1973), 476 F.2d 562.

[7] We are unimpressed, as well, by his argument that the terms "dealer" and "dealing in", as employed in the statute, are too vague and indefinite to constitute a valid criminal statute, because no standards are established as to the number of sales, dollar volume thereof, a fixed or other place of business or number of employees. "Business" is commonly understood to mean an activity engaging some of one's time, attention and effort and performed in expectation of profit or other benefit; "Dealing in firearms" is commonly understood as selling and/or trading in firearms, as well as acquiring firearms for sale by purchase and/or trade. *United States v. Williams* (8 Cir. 1974), 502 F.2d 581; *United States v. Day, supra; United States v. Gross* (7 Cir. 1971), 451 F.2d 1355; *United States v. Powell* (8 Cir. 1975), 513 F.2d 1249.

[8] Tellis Jones next claims that, absent an interstate nexus, Congress exceeded its power in enacting 18 U.S.C. §§ 922(a)(1) and 924(a), and that, moreover, the evidence established no interstate nexus. We hold that the enactment was constitutional and that no evidence of an interstate nexus was required. *United States v. Nelson* (5 Cir. 1972), 458 F.2d 556; *Mandina v. United States* (8 Cir. 1973), 472 F.2d 1110.

[9] Appellant, Tellis Jones, further asserts that the trial court unreasonably limited the length of his attorney's closing argument to the jury. We find no merit in this claim.

The entire trial took two days. Upon inquiry by the trial judge, Tellis Jones' counsel said he "would like forty five minutes". His brother's attorney said that that time would be sufficient. King's counsel said that that would be more than adequate. The trial judge said "I was thinking about thirty minutes for each of you" and a total of forty five minutes for the government. He made no order of limitation, nor did he terminate the closing argument of appellant's counsel. Neither at the beginning nor at the end of his argument did appellant's counsel request additional time or indicate, by any application or statement, that he lacked or was deprived of an opportunity fully to present his argument.

Upon careful review of the entire record, we deem the remaining contentions of appellant, Tellis Jones, without sufficient merit to warrant discussion.

The judgments below are affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

PROOF OF SERVICE

I, B. SAM ENGRAM,JR., attorney for FRED LEE JONES, appellant herein, depose and say that on the 3rd day of September, 1976, I served a copy of the foregoing Petition for a Writ of Certiorari on the United States by depositing a copy of the same in the United States mail properly addressed to RONALD T. KNIGHT, Esq., United States District Attorney, P. O. Box U, Macon, Georgia 31202, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530; and on all co-counsel involved.

B. Sam Engram, Jr.
B. SAM ENGRAM,JR.

Sworn to and subscribed before me at Albany, Georgia, this the 3rd day of September, 1976.

Edna Pursley
Notary Public

Notary Public, Georgia, State at Large
My Commission Expires Mar. 28, 1978